IN THE

Supreme Court of the United States

October Term, 1982

WISCONSIN AVENUE ASSOCIATES, INC., *et al.*,

Petitioners,

v.

2720 WISCONSIN AVENUE COOPERATIVE ASSOCIATION, INC., *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

BRIEF FOR 2720 WISCONSIN AVENUE COOPERATIVE ASSN., INC. IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Supreme Court should exercise certiorari jurisdiction over decision of the District of Columbia Court of Appeals involving matters of local common law.

2. Whether the actions of the District of Columbia courts, in awarding punitive damages and transferring title to certain property, amounted to a denial of due process.

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IN THE

Supreme Court of the United States

October Term, 1981

No. 81-2122

WISCONSIN AVENUE ASSOCIATES, INC., *et al.*,
Petitioners,

v.

2720 WISCONSIN AVENUE COOPERATIVE ASSOCIATION, INC., *et al.*,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

BRIEF FOR 2720 WISCONSIN AVENUE COOPERATIVE ASSN., INC. IN OPPOSITION

OPINIONS BELOW

The opinion of the District of Columbia Court of Appeals is reported at 441 A.2d 956 and is set forth in Petitioners' Appendix (Pet. App. 1a). The opinions of the Superior Court of the District of Columbia are reported at 106 Wash. L. Rptr. 1417 (liability) and 107 Wash. L. Rptr. 117 (damages).

A trial court Memorandum Opinion, Order and Final Judgment (unpublished) dated April 27, 1979, is excerpted in Petitioners' Appendix (Pet. App. 80a).

JURISDICTION

This court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 1257(3) is quoted in pertinent part in Petitioners' Brief at page 3.

STATEMENT

A. Background

Respondents, 2720 Wisconsin Avenue Cooperative Association, Inc. ("Cooperative") and 25 of its members, brought suit in Superior Court for the District of Columbia charging petitioners, individuals who were formerly officers and/or directors of the Cooperative and various business entities which were controlled by them, with breach of fiduciary duty, breach of contract, and unjust enrichment, in connection with the acquisition and sale of the 2720 Wisconsin Avenue property to the Cooperative and the promotion and sale of its individual units to members of the public.

The events and transactions giving rise to the suit commenced in November 1974 when A.V. Laurins & Company, Inc., acting on behalf of petitioner Wisconsin Avenue Associates, Inc. ("Associates"), entered into a contract for purchase of the 2720 property. (Pet. App. 3a, 29a, 32a, 99a). By December 1, 1974, petitioner A.V. Laurins had resolved to convert the building to a cooperative form of housing and to structure the deal so as to minimize any personal risk or liability by creating two

corporate entities, Cooperative and Associates, both subject to his control. (Pet. App. 12a, 33a-34a). On December 6, 1974, settlement on the acquisition of the building took place accompanied by a series of transactions between Cooperative and Associates. In the first such transaction, Cooperative and Associates executed an "Assignment of Purchase Agreement" whereby Associates assigned to Cooperative its right to purchase the property in exchange for a wraparound deed of trust and note in the amount of $945,000. (Pet. App. 3a, 29a). The subject deed of trust was executed by petitioner A.V. Laurins as president of the Cooperative that same day. (Pet. App. 30a, 44a). The Cooperative then acquired title to the property directly from the former owners for the purchase price of $945,000 (Pet. App. 3a, 13a n.7, 31a-32a), following which Associates and Cooperative entered into a written agreement whereby Cooperative agreed to assign to Associates 100 percent of the membership interests in the Cooperative for the sole purpose of selling those interests to individual purchasers. (Pet. App. 4a, 30a). Finally, Cooperative and Associates entered into Mutual Ownership Contracts for each of the 49 units in the building, giving Associates the power to transfer the individual units to the public. (*Id.*).

At the time of the above transactions between Cooperative and Associates, the Cooperative's board of directors consisted of petitioners Laurins, Norman, and Baden, Chasen, and Tompkins while the board of directors of Associates consisted of Laurins, Norman, and Baden. (Pet. App. 4a, 32a). Laurins dominated both boards, the other members viewing themselves as merely his employees. (Pet. App. 11a, 28a). Of key significance here, however, is the fact that Laurins, who was thus in total control of the situation, testified at trial that

he recognized that he owed a fiduciary duty to the Cooperative as of December 6, 1974, the date all of the foregoing agreements and instruments were "negotiated" and executed. (Pet. App. 4a, 33a).[1]

On December 16, 1974, Laurins, on behalf of Cooperative, executed an additional note in favor of Associates in the amount of $100,000. The terms of the note differed from those set forth in the Assignment of Purchase Agreement, under which Associates had agreed to advance to Cooperative all cash necessary for acquiring title, to the Cooperative's substantial detriment. (Pet. App. 4a-5a, 40a-41a). A third note was executed by Cooperative in favor of Associates on September 1, 1975 in the amount of $5,700. (Pet. App. 4a, 42a).[2] This additional $105,700 in corporate indebtedness was never adequately disclosed to prospective purchasers of the individual units. (Pet. App. 5a. 12a, 41a).

Another failure to disclose during the process of selling the Cooperative's units to the public arose in connection with the maintenance fees to be borne by the individual

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[1]Laurins' manner of discharging his acknowledged duties as a fiduciary to Cooperative was described by him as "play acting" with petitioner Norman. In these "mini-dramas", Laurins or Norman would play the part of Associates and the other would purport to represent the interests of Cooperative. Not surprisingly, the trial court concluded that Laurins' play-acting "failed to rise to any acceptable level of performance of a fiduciary in behalf of his corporation," particularly since the focus of the "play acting" was how far petitioners, as developers, could go. (Pet. App. 12a, 41a-42a).

[2]The trial court eventually permitted Associates to recover only $30,700 for closing costs and renovation expenses under these notes, finding that they had been negotiated as an after-thought and as a *post hoc* attempt to add on $75,000 to Cooperative's $945,000 purchase price for the property. (Pet. App. 64a, 70a, 77a). The Court of Appeals concurred. (Pet. App. 13a and n. 7).

purchasers. Non-recurring income items in the amount of $16,100.00 were included in the 1974-75 budget, with the result that the maintenance fees had to increase a minimum of 37 percent in the second year, exclusive of normal increases due to inflation. (Pet. App. 5a, 42a-43a). The failure to disclose the artificial deflation of the first year budget was exacerbated by the failure of the Laurins-controlled management company to prepare the second year budget by October 1, 1975 as required under its contract, since as of that date, only 18 of the 39 units sold prior to the commencement of the litigation had gone to settlement. (Pet. App. 5a, 43a). It was not until January 1976 that the second year budget was finally released, in the form of a notice of increase. (Pet. App. 43a).

After attempts to obtain an explanation for the maintenance fee increase and information concerning the true extent of the Cooperative's corporate indebtedness proved fruitless, respondents commenced the Superior Court litigation. At the time, petitioners still controlled eleven of the Cooperative's units. In the period between the onset of the litigation and trial, petitioners manipulated the units they controlled so as to harass and wield leverage over respondents to the maximum possible extent, leading the trial court to conclude, by way of understatement, that "since the instigation of this litigation, Associates has maintained the unsold units for every purpose *but* that which is specified by the [assignment] agreement."

B. Decision of the Superior Court

The case was bifurcated as to liability and damages and both phases were tried non-jury. The trial court concluded that the individual petitioners, as developers and directors of the Cooperative, clearly owed fiduciary duties to the Cooperative and its members, as Laurins himself had acknowledged. (Pet. App. 32a-35a). The trial court further concluded that petitioners had breached their fiduciary obligations by their failure to disclose adequately the existence of the 105,000 in additional notes (Pet. App. 39a-41a); the overreaching which those same notes represented (Pet. App. 41a-42a, 70a; see p. 4 n.2, *supra*); Laurins' failure to disclose the mandatory increase in the second year budget (Pet. App. 42a-43a, 64a); and petitioners' disregard for the provisions of the Assignment Agreement and Mutual Ownership Contract with respect to sales and lease-options. (Pet. App. 67a-69a). The trial court also found that Laurins, as president and a fiduciary of Cooperative, had violated his duty of loyalty to the Cooperative by the inclusion of four unconscionable and overreaching provisions in the deed of trust. (Pet. App. 44a-47a). In addition, the court concluded that Associates had breached its contractual obligations with respect to conveying the cooperative units to members of the public. (Pet. App. 48a-49a, 67a-69a).

The damages awarded respondents on the basis of the petitioners' breaches of fiduciary duty and of contract included: cancellation of the $100,000 and $5,700 notes; punitive damages in the amount of $30,700 for the bad faith, self-dealing, and breach of fiduciary duty in reference to the $100,000 note; nominal damages for the misrepresentation of certain items in the maintenance budget; partial rescission of the Assignment Agreement between the Cooperative and Associates thereby returning to the Cooperative possession of the unsold apartment

units[3]; and attorneys' fees and costs for the portion of counsel's work which had related to the issues involving petitioners' bad faith breaches of their fiduciary duties to the Cooperative. (Pet. App. 83a-85a). Petitioners were awarded $30,700 for renovation and closing costs under their *quantum meruit* claim for legitimate expenditures for the building. (Pet. App. 86a). In addition, the court invalidated four provisions of the deed of trust both for reasons of public policy and Laurins' breach of his fiduciary obligations. (Pet. App. 44a-47a, 83a).

C. The Decision and Orders of the Court of Appeals

In a unanimous opinion, the District of Columbia Court of Appeals concurred with the trial court's conclusion that petitioners had breached their contractual and fiduciary duties. (Pet. App. 25a). It affirmed, in *toto*, the trial court's ruling on liability and damages and held that the trial court had not abused its discretion in fashioning the equitable remedy of partial rescission or in its award of attorneys' fees to Cooperative with respect to issues involving bad faith and fiduciary breaches. (Pet. App. 22a-23a, 25a). In its discussion of the invalidation of the deed of trust provisions, the Court of Appeals was careful to limit its ruling to the facts of the instant case, emphasizing the particular wording and overreaching nature of the provi-

[3]Under the partial rescission formula worked out by the trial court, Associates was 1) forgiven the amount it owed in maintenance fees; 2) given credit for the payments it had made for mortgage and maintenance with respect to the unsold units; 3) ordered to return to Cooperative all rents it had collected and pay a reasonable rental value for the units which had been occupied by petitioners; and 4) ordered to transfer title to the eleven units back to Cooperative. (Pet. App. 69a).

sions in question as well as the fiduciary duty which had been owed to the Cooperative by the principal negotiator of the provisions, A.V. Laurins, who simultaneously controlled and was a director of both the Cooperative and the beneficiary of the deed of trust. (Pet. App. 14a-21a).

As is clear from the foregoing, the litigation up through and including the decision by the Court of Appeals had been concerned exclusively with issues of common law and, to a much lesser extent, local statute. It was not until the filing of their Petition for Rehearing and Rehearing En Banc that petitioners, by mere invocation, sought to introduce questions of constitutional rights into this litigation. Both request for rehearing were denied, without discussion, by the Court of Appeals on February 23, 1982.

ARGUMENT

The decision of the District of Columbia Court of Appeals presents no federal question which should be reviewed under 28 U.S.C. § 1257(3).

I. Petitioners' contention that the Court should exercise a sweeping power of review over all cases emanating from the local courts of the District of Columbia is contrary to the intent of the 1970 statute restructuring the District of Columbia court system and the decisions of this Court.

The District of Columbia Court Reform and Criminal Procedure Act of 1970, Pub. L. No. 91-358, 84 Stat. 473, restructured the court system in the District of Columbia so that the system resembles the court systems in the several states. H.R. Rep. No. 907, 91st Cong., 2d Sess. 35 (1970). The District of Columbia Court of Appeals was made the highest court of the District, and the judgments

of the local court of appeals were made reviewable under 28 U.S.C. § 1257 as judgments of the "highest court of a State". Pub. L. No. 91-358, § 172(a)(1), 84 Stat. 590. Accordingly, the Court has extended its long-held principle of reluctance to review decisions of the courts of the District of Columbia involving matters of peculiarly local concern, *e.g.*, *Griffin v. United States*, 336 U.S. 704, 717-18 (1949); *Fisher v. United States*, 328 U.S. 463, 476 (1946), to the standard under which "the decisions of the District of Columbia Court of Appeals on matter of local law – both common law and statutory law – will be treated by this Court in a manner similar to the way in which we treat decisions of the highest court of a State on questions of state law." *Pernell v. Southall Realty*, 416 U.S. 363, 368 (1974) (footnote omitted). While the Court has not addressed the specific scope of its certiorari jurisdiction over the District of Columbia Court of Appeals pursuant to 28 U.S.C. § 1257(3), the import of the 1970 Court Reform Act certainly cannot support petitioners' contention (Pet. 13, 16-20) that claims under common law decided by the Court of Appeals are reviewable by the Court absent a constitutional or federal statutory dimension. *See Palmore v. United States*, 411 U.S. 389, 396-97 (1973) (federal constitutional issues heard on petition for writ of certiorari under § 1257(3)).

Thus, petitioners must establish that the constitutional or federal statutory predicates for certiorari jurisdiction under 28 U.S.C. § 1257(3) are met in this case. As discussed *infra*, petitioners' claims under § 1257(3) are illusory and they were not advanced in the trial court and in the court of appeals in a timely fashion. And, because of these deficiencies in setting forth claims reviewable under § 1257(3), this case does not pose an apt opportunity for the court to rule on the scope of certiorari review of decisions of the District of Columbia Court of Appeals.

II. The Superior Court of the District of Columbia held that petitioners had fiduciary obligations to respondents (Pet. App. 32a-35a), and this holding was expressly affirmed by the District of Columbia Court of Appeals (Pet. App. 10a-12a). The existence of such a fiduciary duty is a matter of local common law with no supervening federal constitutional or federal statutory interest involved that meets the jurisdictional predicates of 28 U.S.C. § 1257(3). The decision of the court of appeals rests upon independent and adequate state grounds, *Herb v. Pitcairn*, 324 U.S. 117 (1945), there is no substantial federal question presented, *Seaboard Air Line Ry. Co. v. Watson*, 287 U.S. 86 (1932), and it should not be reviewed by this Court.

III. Petitioners also raise, without averring constitutional implications, two other issues which were decided by the District of Columbia Court of Appeals under local common law: the nullification of certain clauses in the Deed of Trust (Pet. 10, 23-25) and the partial rescission of the assignment agreement between Associates and Cooperative (Pet. 25-26).[4] As with the fiduciary obligation claim, *supra*, these issues do not invoke the Court's jurisdiction under 28 U.S.C. § 1257(3) as there is no federal interest present. Petitioners also appear to argue that the court's nullification of clauses in the Deed of Trust constituted a violation of the statutory separation of powers in the District of Columbia (Pet. 15 & n. 19, 24-25). The unenforceability of these clauses was considered at length by the court of appeals (Pet. App. 14a-21a), and petitioners cannot escape the court's reasoning by simply averring that there was no legislative expres-

[4]Petitioners' related constitutional claim concerning the transfer of title to units covered by the contractual rescission is discussed *infra* at p. 11.

sion of the standards applicable in the District of Columbia.

IV. Petitioners' two constitutional claims that they were denied due process by the trial court's award of punitive damages and the transfer of title to 11 apartment units to the Cooperative were not properly presented in the District of Columbia courts. Further, in neither case have petitioners set forth colorable arguments that they were unconstitutionally denied due process.

Petitioners raised both of these issues for the first time in their Petition for Rehearing and Rehearing En Banc before the court of appeals (Pet. 8, 11-12). For the Court to have jurisdiction to review constitutional claims, those claims must have been presented to the court of appeals in such a manner that they were necessarily decided by the court when it affirmed the trial court's action. *Street v. New York*, 394 U.S. 576, 581-82 (1969). The Court very recently has detailed the jurisprudential underpinnings of this rule, which requires adequate presentation of federal claims in state court proceedings. *See generally Webb v. Webb*, ____ U.S. ____, No. 79-6853 (decided May 18, 1981). Thus, questions of federal interest that are first presented to the highest court of appeals of a state on a petition for rehearing are not adequately presented to allow review by this Court, *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 128 (1945), unless the state court actually entertains the federal issue raised in the petition and decides it.[5] *Cox Broadcasting Corp. v. Cohn*, 420

[5]Petitioners suggest that the rule on presentation of constitutional issues in a petition for rehearing should not apply because the appellate court's decision supplied a new and unexpected basis for constitutional claims (Pet. 11 & n.11). The court of appeals took no "unanticipated act", *Herndon v. Georgia*, 295 U.S. 441, 443-44 (1935), because it simply affirmed the trial court's judgment on the issues of punitive damages and transfer of title. Thus, no exception to the rule applies. *Id.*

U.S. 469, 476 (1975). The order of the District of Columbia Court of Appeals denying the petition made no mention of the constitutional claims, indicating that no issues of federal interest are presented for the Court's review.

Even if the Court should find that petitioners adequately presented the federal issues in the proceedings below, petitioners have failed to mark out a due process claim. First, petitioners argue that the award of punitive damages denies them due process because they were unaware of their underlying fiduciary duties (Pet. 22). In contrast, petitioners were chargeable with that duty, petitioner Laurins admitted his duty, and petitioners amply availed themselves of the opportunity to litigate their obligations and their liability. This is hardly a denial of due process.

Second, petitioners attempted to convert the transfer of title to 11 apartment units from a court ordered equitable remedy to a due process claim (Pet. 26). Again, petitioners have already availed themselves of full due process protections through litigation of the title transfer issue in the trial and appellate courts.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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